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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 317

LOUIS E. MCMAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 424 F. 2d 1216.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1970 (Pet. App. B). A petition for rehearing was denied on April 27, 1970. Mr. Justice Brennan extended the time for the filing of a petition for a writ of certiorari to and including June 26,

1970, and the petition was filed on June 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reversible error resulted from the introduction of certain evidence claimed to be irrelevant and prejudicial.

2. Whether certain instructions of the trial judge constituted plain error.

STATEMENT

A sixteen-count indictment returned in the United States District Court for the Southern District of Illinois charged petitioner and five others with violations of the Securities Act, mail fraud, and conspiracy to commit such acts (App. 13-44).[1] Prior to trial six of these counts (3, 7, 8, 13, 14, and 15) were dismissed on the motion of the government (Tr. 3).[2] Co-defendants Vernon Mendenall, Charles Barbre, Malcolm Rudolph and Glen McCowen all entered pleas of guilty to certain counts of the indictment and testified as government witnesses. The jury found petitioner guilty on four counts (1, 11, 12, and 16),[3]

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[1] "App." refers to appellant's printed Appendix, a copy of which is on file with the Clerk of this Court.

[2] "Tr." refers to the nine-volume transcript of the trial testimony, which we are lodging with the Clerk of this Court.

[3] Count 1 charged a violation of 15 U.S.C. 77q(a) by defrauding purchasers of Southern United Life Insurance Company stock; Count 11 charged a violation of 18 U.S.C. 1341 in causing to be mailed certain insurance stock certificates;

and not guilty on the remaining six (App. 8). On December 9, 1968, petitioner was sentenced to imprisonment for four years on Count 1, fined $5,000 on Count 11, $1,000 on Count 12, and placed on probation for five years on Count 16 (the conspiracy count) (App. 44-45). On appeal the conviction was affirmed.

The evidence, outlined in the opinion below (Pet. App. A, 3-4), showed that in 1962 petitioner and some associates purchased a charter for Southern United Life Insurance Company in Little Rock, Arkansas, with petitioner being appointed president of the company (Tr. 454-463). Thereafter, petitioner and some associates went to Mount Vernon, Illinois, met with co-defendant Vernon Mendenall, who was an insurance agent, and arranged for the sale of Southern stock. At that time there was left with Mendenall 10,500 shares of stock for which he was to pay $.70 per share and sell it for $1.25 (Tr. 21-24, 172).

Subsequently, Mendenall set up a sales organization in which co-defendants Barbre, Rudolph, and McCowen participated. The salesmen sold Southern United Stock to a number of investors who testified regarding their purchases.[4] Petitioner made repre-

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Count 12 charged a violation of 15 U.S.C. 77e(a) in causing to be mailed certain stock certificates which had not been registered with the Securities and Exchange Commission; and Count 16 charged a conspiracy to violate the above statutes (see Pet. App. A, 2-3).

[4] See, *e.g.*, Tr. 26-29, 173, 231-232, 542-545, 563-564, 607, 629-631, 665-666, 780, 1018-1020, 1056-1060, 1085-1086, 1112-1113, 1231, 1241, 1247-1248, 1257-1258.

sentations to various persons, including investors and stock salesmen, that Southern United was very prosperous, when in fact the company was in very poor financial condition, requiring the investment of new capital (Tr. 69-71, 78-79, 97, 156-157, 550, 557, 559-560, 978-980, 989). The salesmen, basing their representations on statements made by petitioner, informed various potential customers that the company was very prosperous and represented a good investment opportunity (Tr. 188, 401, 557-561, 771-772, 1233).

When sales of Southern United stock were made, the proceeds would be sent to petitioner at the home office in Little Rock (Tr. 29-30, 398-400). The mails were used in the collection of various checks involved and in sending out stock certificates which had been purchased (Tr. 721-727, 845-846, 1094-1095, 1254-1255). The stock of Southern United was not registered with the Securities and Exchange Commission, nor was it registered with officials of the State of Illinois. On February 5, 1963, the Secretary of State of Illinois issued an order requiring Southern United to cease and desist from the sale of its stock (Tr. 949-950).

ARGUMENT

A variety of allegations are made regarding the admissibility of evidence, the validity of the conspiracy charge and the adequacy of certain instructions given to the jury. None of the claims warrants plenary review by this Court.

1. Petitioner contends that the government introduced irrelevant and prejudicial evidence as to two matters—the Arkansas State Life Insurance Company and the Columbia Investment Company (Pet. 18-23).

a. Mrs. Gieseking, a purchaser of Southern United stock, testified that in January 1963 co-defendant McCowen (who had entered a guilty plea prior to trial) told her that he knew that she had stock in Southern United and that he was selling Arkansas State Life Insurance Company stock (Tr. 1266-1267). Mrs. Gieseking identified Government Exhibits 141 and 142, which showed that she and her husband purchased stock in Arkansas State Life (Tr. 1266, 1268).[5] Arkansas State Life and Southern United later entered into a merger agreement (Tr. 1001-1002).

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[5] Petitioner seeks (Pet. 19-22) to find a certiorari question in the fact that the court of appeals pointed out petitioner's failure to meet his burden of showing prejudice in these circumstances (Pet. App. A, 5). But the situation here is wholly unlike the situation where "highly prejudicial evidence" in violation of constitutional rights casts upon the government (the offending party) the burden of showing lack of prejudice. See *Chapman* v. *California*, 386 U.S. 18, 24. Here the error was clearly of a minor nature and non-constitutional in character; it was incumbent upon petitioner to show—as he failed to do—that it fatally prejudiced the jury. See *Ryno* v. *United States*, 232 F. 2d 581, 584 (C.A. 9). Moreover, the situation here is entirely different from that in *United States* v. *Randolph*, 403 F. 2d 805 (C.A. 6) (see Pet. 20), where government counsel on cross-examination of the accused improperly asked if he had participated in an unrelated criminal act, and the record did not disclose any factual basis for the question.

Defense counsel moved for a mistrial on the ground that the government was introducing evidence of another crime for which petitioner was not charged, and that the court could not cure this prejudice by an instruction to the jury (Tr. 1268-1269). The court denied the motion and promptly charged the jury "positively to disregard any testimony about Arkansas State Life Insurance Company"; that it had no connection with petitioner; and that it was "not to be considered in any wise as part of this case" (Tr. 1273). Petitioner to the contrary (Pet. 18-21), the district court's unconditional and prompt instruction cured any error in the introduction of this single piece of evidence in this lengthy case. See *Frazier* v. *Cupp*, 394 U.S. 731, 735-736; *Bruton* v. *United States*, 391 U.S. 123, 135. That the jury was particularly sensitive to its duties is underscored by its selective verdict.

b. One Hastings, an attorney-examiner for the Securities Division of the State of Illinois, testified that he was in court by reason of a subpoena *duces tecum* to produce records pertaining to Southern United, including a restraining order issued to Southern United by the State of Illinois. With regard to his apparently inconsistent testimony as to whether, in response to another subpoena, he had brought a cease and desist order relating to Columbia Investment Company (Tr. 414-417), defense counsel moved for a mistrial, which was denied (Tr. 417-422). Thereafter, without any defense objection, the prosecution offered for identification by this witness the cease and desist order issued to prohibit the sale of

securities in Illinois by Columbia Investment Company (G. Ex. 22, Tr. 422). Other government exhibits (Govt. Exs. 23-25) concerning Columbia Investment Company were also introduced in evidence without any defense objection (Tr. 423-424). Immediately after Hastings' testimony, the government called one Horton to testify, in an attempt to tie petitioner into Columbia Investment. When government counsel inquired as to Horton's purpose in traveling to St. Louis to meet petitioner in December 1960, defense counsel objected: "It's irrelevant and immaterial, it isn't within the scope of the indictment, starts in October 1, 1961 [the date the indictment alleged the conspiracy began].". After the court overruled the objection, Horton answered: "In connection with Columbia Investment Corporation" (Tr. 433-434). Horton testified that while in St. Louis he learned that the Illinois Securities Department had issued a cease and desist order against Columbia Investment Company (Tr. 435-436); and that petitioner was connected with Columbia Investment Company (Tr. 438-446). Horton further testified that on January 29, 1962, he went to the Securities Department office at Springfield, Illinois, to investigate Columbia Investment Company's possible violation of Illinois laws relating to securities (Tr. 447). Horton testified that petitioner was not named in the cease and desist order against Columbia (Tr. 473). No specific objection was raised by defense counsel on the ground that reference to Columbia was irrelevant.

From the foregoing recitation it is certainly arguable that the court below did not err in ruling that no objection had been made to the introduction of the challenged evidence at the trial on the ground that reference to Columbia was irrelevant (see Pet. App. A, 4-5). At all events, the further ruling of the court below—that no plain error requiring reversal was shown—was plainly correct. Petitioner was not named in the cease and desist order; nor was there any proof adduced at trial that he had any knowledge of the order or any possible violations by Columbia Investment Company in Illinois. Mere "minor aberrations in a prolonged trial" such as that involved here, do not warrant reversal. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 239-240.

2. *a.* Petitioner's contention that the court's charge to the jury improperly failed to require a finding of a single conspiracy (Pet. 24-26) is insubstantial. Viewed realistically, the charge did require a finding of a single conspiracy. It stated that Count 16 charged "a conspiracy" (Tr. 1560) and that to convict petitioner the government had to prove beyond a reasonable doubt the existence of "a conspiracy" (Tr. 1561, 1563, 1564). Moreover the indictment charged only one conspiracy (namely that relating in Count 16 to sales to investors in Southern United Life Insurance Company (App. 34-45)). The overt acts pertain almost exclusively to Southern United, and the count refers several times to "said conspiracy" (in the singular) (App. 39). The evidence also discloses only the single conspiracy relating to sales to investors in Southern United. Contrast *Blumen-*

thal v. *United States*, 332 U.S. 539, 558-559, which is here controlling, with *Kotteakos* v. *United States*, 328 U.S. 750, upon which petitioner improperly relies (Pet. 17, 24).

b. In its final charge, the court, without defense objection, instructed in pertinent part as follows (Tr. 1550-1551):

> It is the province of the Jury to determine the credibility of each witness and the weight to be given to his testimony. In weighing the testimony of each witness, the Jury should consider * * * the extent to which he has been corroborated or contradicted, if at all, by other credible evidence.
>
> If the Jury believes that a witness has willfully sworn falsely to a material fact in the case, the jury may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence in the case.

We point out initially that, having failed to object to these instructions at trial, petitioner should not now be heard to claim error thereon. Rule 30, F.R. Crim. P. Nor, as it is now asserted, did this instruction constitute "plain" error affecting substantial rights. Rule 52 (b), F.R. Crim. P. Petitioner reads the last paragraph of this instruction as not requiring the jury "to disregard that portion of a witness' testimony which they believe [is] false" (Pet. 27). This is a strained construction which wholly overlooks the paragraph immediately preceding. The more natural interpretation is that the jury was told it could consider that part of a witness' testimony which it be-

lieved to be true where it has been corroborated, even though it believed other testimony which he has given to be false and not to be credited. See *United States* v. *Kahn*, 381 F. 2d 824, 835-836 (C.A. 7), certiorari denied, 389 U.S. 1015; *Mason* v. *United States*, 95 F. 2d 612, 614 (C.A. 5).

c. There is no basis to petitioner's contention that the court committed plain error in failing to instruct that testimony of the co-defendant accomplices should be received with caution. Petitioner made no request at the trial for such an instruction (Pet. 28-29). Moreover, it is not reversible error to fail to give such an instruction, particularly where, as here, there was corroboration of the accomplices' evidence by reason of testimony of defrauded investors (see, *e.g.*, Tr. 1056-1060, 1085-1086, 1112-1113, 1241, 1247-1248, 1257-1258). *Mims* v. *United States*, 254 F. 2d 654, 655-658 (C.A. 9); *Stoneking* v. *United States*, 232 F. 2d 385, 390-392 (C.A. 8), certiorari denied, 352 U.S. 835.

Tillery v. *United States*, 411 F. 2d 644 (C.A. 5), is not in conflict since there the testimony of the accomplice was not corroborated and was thought by the court of appeals to be unreliable by reason of previous conflicting statements concerning his knowledge of the crime. In *Tillery*, moreover, the court recognized that "[t]he failure to warn a jury about accomplice testimony is not necessarily reversible error in all cases" (411 F. 2d at 647).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT G. MAYSACK,
Attorneys.

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